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No. 99-___

In The

Supreme Court of the United States

AIRPORTS COUNCIL
INTERNATIONAL–NORTH AMERICA,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF
TRANSPORTATION, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1997, the District of Columbia Circuit rejected the Secretary of Transportation's decision finding unreasonable Los Angeles' fair market value-based airfield land rental charge. The court concluded that the Secretary had fundamentally misunderstood the governing law in requiring the use of historical cost valuation. *Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027, 1032 (D.C. Cir. 1997). On remand the Secretary again determined the fee to be unreasonable. Thereafter, in a decision that is irreconcilable with the prior decision, a divided D.C. Circuit upheld the Secretary's determination. *City of Los Angeles v. DOT*, 165 F.3d 972 (D.C. Cir.), *reh'g denied en banc*, 179 F.3d 937 (D.C. Cir. 1999).

1. In requiring State and local governments to subsidize commercial airlines by interpreting the federal airport grant statute retroactively to impose unstated conditions, did the Secretary violate the clear statement requirement of *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)?

2. By forbidding States and other governmental owners of the Nation's principal airports from using any methodology other than historical cost in valuing airfield land provided for airlines' use, did the Secretary violate (1) the provisions of the Anti-Head Tax Act (49 U.S.C. § 40116 *et seq.*), as interpreted by *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994), (2) the Airport and Airway Improvement Act (49 U.S.C. § 47107(a) *et seq.*), (3) the Federal Aviation Administration Authorization Act (49 U.S.C. § 47129), (4) the Tenth Amendment to the Federal Constitution, and (5) established principles of federalism and comity?

PARTIES TO THE PROCEEDING

Petitioner Airports Council International–North America ("ACI-NA") represents the state and local governmental bodies that own and operate the nation's principal airports. ACI-NA was an intervenor in each of the prior D.C. Circuit appeals, and in the administrative proceedings below, because of the importance of the issues presented.

The City of Los Angeles, the City of Los Angeles Department of Airports and the Los Angeles Board of Airport Commissioners, who own and operate Los Angeles International Airport ("LAX"), have also filed a Petition for a Writ of Certiorari in this matter.

The respondents are the Department of Transportation, Rodney E. Slater, Secretary of Transportation, and Patrick V. Murphy, Deputy Assistant Secretary for Aviation and International Affairs. The Air Transport Association of America intervened in the underlying litigation and filed a brief in support of respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Airports Council International–North America respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 5, 1999.

OPINIONS BELOW

The following are the opinions of the United States Court of Appeals for the District of Columbia Circuit and the final decision on remand issued by the Department of Transportation ("DOT"):

1. *City of Los Angeles v. DOT*, 165 F.3d 972 (D.C. Cir.) (*"LAX II"*), *reh'g denied en banc*, 179 F.3d 937 (D.C. Cir. 1999), reprinted in the Appendix[1] at 1a.

2. Final Order on Remand, *Los Angeles Int'l Airport Rates Proceeding and Second Los Angeles Int'l Airport Rates Proceeding*, Dec. 23, 1997 ("Remand Decision"), App. 18a.

3. *Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027 (D.C. Cir. 1997) (*"LAX I"*), App. 79a.

4. *City of Los Angeles v. DOT*, 179 F.3d 937 (D.C Cir. 1999) (denying rehearing of *LAX II*), App. 109a.

[1] Citations to "App." refer to the Appendices attached to the accompanying Petition for a Writ of Certiorari filed by the City of Los Angeles.

STATEMENT OF BASIS FOR JURISDICTION

The D.C. Circuit's decision in *LAX II* was entered on February 5, 1999. App. 1a. ACI-NA and the City of Los Angeles filed timely petitions for rehearing on March 22, 1999. The D.C. Circuit denied those petitions on June 18, 1999. The D.C. Circuit's jurisdiction was based on 49 U.S.C. § 47129(c)(5), 49 U.S.C. § 46110(a) and 5 U.S.C. §§ 701-06. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant portions of the following statutory provisions involved are contained in Appendix B to the accompanying petition filed by the City of Los Angeles:

49 U.S.C. § 40116

49 U.S.C. § 47107

49 U.S.C. § 47129

49 U.S.C. App. § 1513

49 U.S.C. App. § 2210

STATEMENT OF THE CASE

LAX's Adoption of Its Compensatory Rates and Charges Methodology. Operating agreements in effect for over 25 years between Los Angeles and the airlines using LAX expired in 1993. J.A. 29.[2] Those agreements required LAX to use a "residual" methodology for calculating landing fees, whereby the fees covered only the amount by which LAX's total expenses exceeded its revenues from all sources other than landing fees. As a result, the landing fees were subsidized by LAX's concession revenues and bore no relationship to the cost of services and facilities provided to airlines. J.A. 26-27.

Before expiration of the old operating agreements, Los Angeles retained a leading airport management consulting firm to reexamine its rates. The firm recommended a "compensatory" or "cost of service" methodology by which airlines would be charged for the full cost of the services and facilities they used. J.A. 30-31. Los Angeles adopted the recommendation and included in the landing fee a land rental charge for the use of LAX's locally-funded airfield land based on the land's fair market value.

By 1992, the airfield land's value greatly exceeded its historical cost. Most of the land had been acquired before 1955, at costs averaging $2,427 per acre. Land acquired between 1955 and 1976 averaged $204,327 per acre. The land was conservatively appraised at $150,000 per acre. After adjustment to exclude land acquired with federal

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[2] "J.A." citations to the record below refer to the Joint Appendix in the D.C. Circuit *LAX II* appeal.

grants, the annual fair rental charge for the LAX airfield land was set at $8,348 per acre. J.A. 35.

Statutes Affecting Reasonable Airport Rates and Charges. Two federal statutes addressing airport charges to airlines were in effect in 1993: (1) The Anti-Head Tax Act ("AHTA"), 49 U.S.C. App. § 1513(b) (subsequently recodified at 49 U.S.C. § 40116(e)(2)), which prevented the imposition of head taxes on airline passengers and specifically authorized State and local government proprietors to charge *"reasonable rental charges,* landing fees, and other service charges *from aircraft operators for the use of airport facilities"* (emphasis added); and (2) The Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. App. § 2210(a) *et seq.* (subsequently recodified at 49 U.S.C. § 47107(a)(13)(A)), which contained a grant condition requiring airports receiving grants to make airport facilities available "on fair and reasonable terms." The AAIA also expressly provided that airports "must maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . . " *Id.* § 2210(a)(9).

In *Northwest Airlines v. County of Kent,* 510 U.S. 355, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994), this Court upheld Kent County's use of a compensatory methodology in setting rates and rejected the airlines' attempt to require "cross-crediting" of non-airline revenues to pay the cost of aeronautical facilities. The Court held that an airport charge is reasonable "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not

discriminate against interstate commerce." 510 U.S. at 369.[3]

On August 23, 1994, Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA") providing an expedited procedure for resolving airport-airlines rate disputes and directing the Secretary of Transportation to establish guidelines for determining the reasonableness of airport fees. 49 U.S.C. § 47129(b)(2). Congress expressly affirmed that airports may use compensatory methodologies. *Id.* § 47129(a)(2). The statute also noted that the Secretary may only determine whether the fee is reasonable and "shall not set the level of the fee." *Id.* § 47129(a)(3). Congress expressed no intention of overruling *Kent County*.

The Rates & Charges Policy. The Secretary's 1995 Policy Regarding Airport Rates & Charges provided that "[a]irport assets included in the rate base must be valued according to their historic cost to the original airport proprietor." 60 Fed. Reg. 6906, 6917 (Feb. 3, 1995). It also provided that for "facilities other than airfield facilities and land, an airport proprietor may use valuation methodologies other than historic cost valuation . . . so long as total aeronautical revenues do not exceed the total costs (based on historic costs) included in the aeronautical rate base . . . . " *Id.* § 2.4.1(a).

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[3] The Court noted that the Secretary of Transportation may adopt a more rigorous standard providing that such standard represents "a permissible construction of the statute." 510 U.S. at 368 n.14.

After soliciting additional comments regarding the Policy, the Secretary adopted his Final Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996). Despite an outpouring of criticisms of the historical cost requirement, the Final Policy retained the requirement for valuing airfield land assets. The Policy did, however, allow airports to base other aeronautical fees on methodologies other than historical cost, including fair market value.

Subsequently, on appeal, in *Air Transp. Ass'n of Am. v. DOT*, 119 F.3d 38 (D.C. Cir. 1997), the D.C. Circuit vacated portions of the Final Policy, including the airfield historical cost requirement. The D.C. Circuit criticized DOT's justifications for the Final Policy's requirement that airfield assets be valued at historical costs and held that DOT had not justified the use of two different standards for valuing aeronautical assets – historical costs for airfield assets and "any reasonable methodology" for non-airfield assets. 119 F.3d at 44. The Secretary has not yet adopted replacement provisions for the vacated portions.

The Airlines' Challenge and Los Angeles' Response. Immediately after issuance of the 1995 Policy, a group of airlines operating at LAX filed an Amended Complaint with DOT seeking to invalidate the 1993 fees. The airlines alleged that the fair market value-based land rental charge violated DOT's Policy and that the historical cost requirement was required by existing law and generally accepted accounting principles. J.A. 272. The airlines did not challenge the appraisal on which the land rental charge was based. App. 91a-92a.

Los Angeles responded that existing law fully supported the use of fair market value, that airlines had long paid fair market value in leasing land used for aircraft maintenance, cargo and terminal facilities at LAX, and that sound economic considerations supported that methodology. The City submitted declarations of Michael Brown, an airport expert, and three renowned economists, Professors Ferdinand Levy and Kenneth Arrow (a Nobel Laureate) and Dr. Frederick Warren-Boulton (a regulatory economist), explaining why historical cost valuation, particularly without any rate of return, made no sense. They pointed out:

- Land, unlike depreciable assets, generally appreciates. As a result, over time, the land's historical cost becomes an increasingly smaller fraction of its fair market value. Requiring the use of historical cost to value airfield land provides a subsidy to commercial air carriers.

- The historical cost requirement ignores the opportunity cost associated with providing the airfield land for the airlines' use, which opportunity cost is measured as the value of the land in its next best use. It also ignores such basic economic realities as inflation. The use of fair market value is a tool to achieve an efficient allocation of resources.

- The goal of regulation is to mirror prices set in a competitive market. Price in a competitive market equals opportunity cost. Even in regulated industries such as utilities (where the regulatory agency has the power to set the fee) the use of historical cost valuation is always coupled with an allowed reasonable

rate of return (for which DOT's Policy does not provide).

- The use of historical cost without an allowed rate of return could not possibly comply with the Congressional requirement that airports be as self-sustaining as possible. *See* J.A. 35-38, 77-93.

After a hearing before an Administrative Law Judge, the Secretary determined that Los Angeles' land charge was unreasonable because it was not based on the historical cost of the land. Although the Secretary's Final Decision referred to the Policy dozens of times, it concluded that the use of historical costs was required by existing law: "[W]e are construing an existing legal requirement, not creating a new one." J.A. 508. The Secretary did not address the substantial economic arguments and evidence against the historic cost requirement that Los Angeles presented.

While the ALJ had concluded that Los Angeles could charge a fee for the rental of the LAX land based on its historical cost, the Secretary decided that, with the exception of a small amount of debt service remaining,[4] LAX could not assess *any* land rental charge because LAX had paid the debt service on the historical cost of the land while operating under the residual agreements. J.A. 505, 510-11.[5]

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[4] At the time of the Secretary's final decision a small amount of debt service relating to the acquisition of the land remained to be paid.

[5] The ALJ determined that the landing fees paid under the residual agreements did not pay for the debt service on the land.

The D.C. Circuit's Conflicting *LAX I* and *LAX II* Decisions. In *Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027 (D.C. Cir. 1997) (*"LAX I"*), the Circuit reversed and remanded the Secretary's Final Decision, concluding that the Secretary had a "fundamental misunderstanding of the governing law." App. 90a. It observed that this Court has never "held that historic cost represents the only true measure of cost and the Secretary points to no law, regulation, or agency decision to that effect." App. 89a. The Circuit also explained that regulatory agencies and economists have recognized opportunity costs.[6] It concluded that nothing in existing law prescribed "an accounting, rather than an economic conception of cost in airport ratemaking," and the existing law did not require the use of any "single formula" in airport ratemaking. App. 89a-90a.[7]

J.A. 459. The airlines "could not say that landing fees paid the airline costs associated with the airfield and apron. . . . In fact, landing fees did not cover the airlines' portion of the airport's operating and maintenance expenses." J.A. 460 n.4.

[6] Opportunity costs, such as the costs of foregoing alternative uses of property, have been widely recognized by courts, economists and regulatory agencies. *See, e.g., LAX I*, 103 F.3d at 1032; *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 997 F.2d 949, 954 (D.C. Cir. 1993); *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1369 (7th Cir. 1985) ("[C]ourts now understand that an opportunity cost is a real cost.")

[7] Attempting "to avoid a useless round of litigation" the Circuit rejected DOT's other rationales for requiring the use of historical cost, noting that other airports' use of historical cost did not demonstrate that historic cost "is uniquely indicated under a compensatory regime." It also rejected DOT's contention that it is easier to value land on the basis of its historical cost than its fair market value. App. 91a-93a.

On remand, ACI-NA urged DOT not to strain to find an alternative basis to require the use of historical cost to the exclusion of all other methods of valuing airfield land. DOT had repeatedly concluded, in both the LAX litigation and in several versions of the Policy, that airfield land must be valued at historical cost, even though the law did not require its use, and there was no evidence in the record that LAX's fair market value based charge was unreasonable. The Secretary nevertheless embraced two arguments that the airlines had made unsuccessfully in *LAX I:* (1) federal grant assurances requiring LAX to operate as an airport meant that LAX had no opportunity cost to use the land in any other use, and, therefore, LAX was required to use historical cost valuation; and (2) the benefits to Los Angeles from operating LAX as an airport outweighed any opportunity cost. App. 38a, 51a-52a.

In *City of Los Angeles v. DOT,* 165 F.3d 972 (D.C. Cir.), *reh'g denied en banc,* 179 F.3d 937 (D.C. Cir. 1999) (*"LAX II"),* a different panel of the Circuit upheld the Secretary's historical cost requirement. Contrary to *LAX I,* the *LAX II* panel accepted the airlines' grant assurance and benefits arguments. The panel concluded that limiting the airport owner to recovery of historical cost was justified because, as a result of its agreement to the grant condition that LAX be available for public use as an airport, Los Angeles has no opportunity to use its locally-funded land for any purpose other than an airport. App. 10a-11a. *LAX II* also upheld the Secretary's conclusion that LAX's fee is unreasonable because it is "covered" by the "benefits" Los Angeles receives from having an airport. App. 13a.

The Circuit's Opinions on Rehearing. The opinions on rehearing were sharply divided. The concurrence

upheld DOT's decision, citing a deferential standard of review, although it acknowledged that economists would reach a different result. App. 110a-111a. The dissent made clear that "the agency cannot reject opportunity cost – or any other reasoned proposal offered by a party – without some reason." App. 113a.[8] The dissenters concluded that DOT's notion that opportunity costs are inapplicable if the owner of a resource is contractually obligated to use it for a specified purpose is a "non-sequitur," and that the determination that the grant assurances required the use of historical cost made no sense. The dissent also found incomprehensible the *LAX II* panel's acceptance of DOT's conclusion that the fee was unreasonable because the economic benefits of the airport to the City "covered" the opportunity cost of the land. App. 114a-116a.[9]

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[8] The concurring opinion erroneously stated that the distinguished economists who had given declarations in the original proceeding never appeared on remand. In fact, the Secretary, with the parties' concurrence, determined not to receive new evidence on remand. J.A. 670-71. The declarations of Prof. Levy and Dr. Warren-Boulton (who made the same points Prof. Arrow had made) however, were part of the remand record as well as the record on appeal. *See* J.A. 77-86, 87-93.

[9] The grant assurance and benefit arguments are not even mentioned in the Secretary's Final Decision following the proceeding before the ALJ. *See* J.A. 578-637. It was only on appeal that these arguments were made, in violation of DOT's rule that the airlines' entire grounds and evidence for challenging the fees were required to be set forth in their complaint. 14 C.F.R. § 302.605.

IMPORTANCE OF THE ISSUES PRESENTED

State and local governments that own and operate the Nation's principal airports depend on rates and charges imposed on airlines and other users of aeronautical facilities to fund operations, maintenance, improvements and developments. Forbidding airport proprietors from using fair market valuation of airfield land in calculating such rates and charges thwarts the will of Congress expressed in the AHTA, AAIA and FAAAA, cannot be reconciled with this Court's decision in *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994), and creates unnecessary collisions with the Constitution and established principles of comity and federalism.

The issues presented are of vital importance to airports, to the Nation's air transportation system and to interstate and international commerce.

As established by the record in this case, the decision below gives the airlines the use of LAX's extremely valuable airfield land for *no charge* – thereby subsidizing commercial airlines at the expense of State and local governments. The decision below severely threatens the ability of those governments to meet the Nation's airport development needs in the 21st Century.

REASONS FOR GRANTING THE PETITION

LAX I and *Air Transp. Ass'n of Am. v. DOT*, 119 F.3d 38 (D.C. Cir. 1997) are in conflict with *LAX II*. In the former two cases, Circuit panels twice rejected the Secretary's determination that airfield land rental charges must be based solely on the historical cost of the land. *LAX II* reaches the opposite decision without any reasoned explanation for doing so. It upholds an interpretation of the applicable statutes in a manner that is contrary to Congress' expressed intent by relying on deference to the Secretary's arbitrary decision.

The intracircuit conflict in the District of Columbia Circuit should be of as much concern to this Court as intercircuit conflict is in other cases interpreting and applying federal law because of the pivotal role that the D.C. Circuit plays in reviewing Secretarial decisions and those of federal administrative agencies.[10]

LAX II does not explain why LAX land must be valued at historical cost. Nor does it explain why State and local governmental entities are required to provide such valuable locally-funded facilities for the use of profit-making air carriers without any charge, or why any deference should be accorded a decision of the Secretary that impermissibly adds new conditions to federal grant assurances. Freezing land values based on inapplicable grant provisions is every bit as unlawful and arbitrary as

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[10] *Cf. Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (in which the Court granted certiorari to resolve intracircuit conflict); *Maggie v. Zeitz*, 333 U.S. 56, 59-60 (1948) (same).

were the arguments to support historical costs previously advanced and rejected.

I. The Opinion Below Retroactively Adds New Conditions to the Federal Grant Statute Contrary to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

The two provisions of the AAIA grant conditions on which the Secretary relies[11] cannot be construed to prohibit the use of fair market valuation. They in no way suggest that grant recipients will be prohibited from charging fair market value-based rental charges for the use of locally-funded facilities, much less that they will be required to provide such facilities for the airlines' use without charge.[12]

Pennhurst held that new conditions cannot be added retroactively to grant assurances. The Court explained that federal funding legislation is "much in the nature of a contract: in return for federal funds, the States agree to

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[11] Section 47107(a)(1) states that the airport will be made available for public use on reasonable conditions; section 47107(a)(16) states that the Secretary must approve modifications to the airport layout plan.

[12] Absent a clear expression of congressional intent, the interpretation of the word "reasonable" in the AAIA cannot be different from the interpretation of that word in the AHTA. The legislative history of the AAIA contains no suggestion that Congress intended the word to have different meanings in the two acts. The *LAX I* panel expressly decided that the word "reasonable" in the AHTA does not preclude the use of fair market value or any other methodology. *LAX II* holds that "reasonable" in the AAIA precludes the use of fair market value.

comply with federally imposed conditions." 451 U.S. at 17. The Court said:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition of the grant of federal moneys, it must do so unambiguously. [Citations omitted.] By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id.; see also Bennett v. New Jersey, 470 U.S. 632, 640-41, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985).

The decision below is in conflict with the Fourth Circuit's decision in *Virginia Dep't of Ed. v. Riley*, 106 F.3d 559 (4th Cir. 1997). In its *en banc* decision, the Fourth Circuit properly recognized *Pennhurst's* requirement that, in placing conditions upon States' receipt of federal funds, Congress must have affirmatively imposed the condition in "clear and unmistakable statutory terms." 106 F.3d at 562-63.

Contrary to the decision below, local governments never agreed retrospectively to give up their rights to recover fair market value-based charges for using locally-funded airfield land. Heretofore, no court or agency decision has ever interpreted the grant conditions – in effect for over seventeen years – to have any such effect.

If Congress had intended that States and local governments contribute their funds to airport assets, such as land, without being able to recover anything more than

the assets' historical costs, Congress would have clearly said so. It did not.

The panel below rejected the arguments advanced by the petitioners, stating that "we do not view the Department's reasoning as adding new conditions to the grant. Rather, the Department focused on a *consequence* of an unambiguously imposed condition – that the airport would be kept open for public use – that was present from the outset." App. 13a. The panel did not and cannot explain how forbidding the use of fair market valuation is relevant to keeping airports open or maintaining layout plans. Under no stretch of the imagination can it be said that States agreeing to accept Federal grants would have been cognizant of such a consequence of their participation.

II. No Deference is Due the Secretary's Decision Because it is Contrary to Congress' Intention that Airports Charge Reasonable Rental Rates and Be as Self-Sustaining as Possible.

In the AHTA, Congress expressed its intention that State and local governmental proprietors of airports may charge reasonable rental charges and landing fees from aircraft operators. 49 U.S.C. at § 1513(b). After this Court upheld the use of the compensatory methodology for landing fees, Congress reaffirmed that fees "may be calculated pursuant to either a compensatory or residual fee methodology or any combination thereof." 49 U.S.C. § 47129(a)(2). The compensatory methodology allows proprietors to recover the full costs of the facilities provided for the airlines' use. *LAX I* rejected the airlines'

argument for historical accounting costs rather than economic costs, observing that nothing in the existing law prescribed "an accounting rather than an economic conception of cost in airport ratemaking." App. 90a.

The decision below forecloses LAX from charging airlines *anything* for its most valuable asset – its airfield land. However, Congress was explicit that State and local governments are not to provide airlines free use of airport facilities, and it expressly forbade the Secretary from setting the level of the fees. 49 U.S.C. § 47129(a)(3). The panel's decision below disregards Congress' specific direction that airports must charge fees "that will make the airport as self-sustaining as possible under the circumstances existing at the airport." 49 U.S.C. § 47107(a)(13). The panel's conclusion also disregards the grant assurance requirement that if grant-acquired land is no longer needed for an airport, the owner "will *dispose of the land at fair market value* or make available to the Secretary an amount equal to the Government's proportional share of the *fair market value*. . . . " *Id.* § 47107(c)(2)(B)(i) (emphasis added).[13] The Secretary had no discretion to add any new condition to the grants, and no deference to his decision should have been given by the panel below.

The Secretary was not at liberty to foreclose fair market valuation of land used for airports and to mandate the use of historical costs because the result is an

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[13] Nothing in the grant assurances suggests that Congress intended to require *locally*-funded land to be valued at historical cost while requiring *federally*-funded land to be valued at fair market value.

absurdity that Congress never intended. Valuable facilities the historical cost of which has already been paid, but which have significant remaining life, would thereby have to be provided to the airlines *without charge*. Airports must rely on fair market value-based charges for the use of such facilities to sustain the financial integrity of airports – as Congress has required. By mandating the use of historical costs without providing an accompanying rate of return, the opinion below has thereby insured that prices will be *below competitive market prices*. No rational basis exists for requiring such a result.

The *LAX I* panel properly recognized that regulation is based on economic concepts, including the principle of opportunity costs. An opportunity cost is incurred when an alternative is foregone. That Los Angeles agreed to operate LAX as an airport for a period of years (and thus to forego alternative uses of the land) simply demonstrates that it has in fact incurred an opportunity cost. The *LAX II* panel plainly misapprehended not only the principle of opportunity cost, but also the goal of regulation, which is to mirror prices set in equilibrium in a competitive market. *See* J.A. 79, 91-93.

The *LAX II* panel's benefit theory is as untenable as would be a decision that owners of airport hotels must rent rooms to airline personnel at rates based solely on the land acquisition costs at the time the hotel was erected because the hotel owners benefit from airlines. Yet, without even waiting for the ink to dry on the decision below, the airlines have now argued to the Secretary that the fees for *other* non-airfield aeronautical facilities (terminals, hangars, cargo facilities, etc.) – which airports have long valued at fair market value without

complaint by airline users -- are unreasonable because they are outweighed by the benefits that the City derives from the airport. The derived benefits rationale does not even consider the benefits that cities and airports provide to airlines, nor does it consider the cost of airline operations borne by the surrounding communities (such as environmental and noise costs, traffic and roadway expenses, etc.).[14]

A similar derived benefits rationale was rejected by this Court in the *Kent County* case, in which the Court declined to require "cross-crediting." The airlines argued in that case that fees received by an airport from its concessionaires should be used to reduce airline charges because concessionaires benefit from airline operations. Passengers choose air travel because they wish to go some place. The airlines are the primary recipient of the derived benefit because it is the cities with their specific attributes that attract air commerce. Under the derived benefit logic, if all economic players were required to share profits based on the benefits they confer on each other, the airlines would have to share their profits with cities because the cities are the significant factor in creating a market for the airlines.

Under the panel's rationale, *any* cost of an airport could be said to be "covered" by the benefits derived from having an airport. That theory would apply equally

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[14] In an interdependent economy, all entities benefit in one manner or another from the activities of other entities. The gas station on the corner near Camden Yards benefits from baseball, but it is not required to pay for that benefit. The airlines benefit from Disneyworld, but do not pay Disney for it.

to historical costs. For example, the airlines could contend that the costs of repairing potholes in the runways is more than offset by the benefit the city receives from the airport and, thereby, the airlines would receive yet another subsidy from airport proprietors.

Taken to its logical conclusion, the benefits argument could prevent airports from charging landing fees *at all*, depending on a hypothesized benefit provided to the residents and businesses of sponsor cities.[15] The *LAX II* panel notes that DOT has not entirely prevented airports from charging landing fees. 165 F.3d at 979 n.4. The panel has not addressed the logical flaw exposed by the point, however. It is not rational to base a determination of reasonableness of a fee on whether it is "covered" by some *other* benefit.[16] Moreover, DOT *has* decided that LAX cannot charge anything for the use of the LAX airfield land.

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[15] Congress plainly did not intend such a result when it expressly authorized airports to charge air carriers "reasonable rental charges" for the use of airport facilities. If Congress had intended the derived benefits to offset reasonable rental charges, Congress would have added the proviso "unless the charge is outweighed by the benefits airport sponsors receive from the airport" at the end of the authorization language.

[16] The Court's definition of reasonableness in *Kent County* considered the fee in relation to the benefits conferred on the user for the use of the facility (i.e., whether the landing fee is reasonable in relation to the benefits the airlines receive from their use of the airfield) *not* the benefits that other airport users or the city derives from the airport. 510 U.S. at 367-39.

III. The Decision Below Violates the Tenth Amendment to the United States Constitution, as well as Established Principles of Comity and Federalism.

By requiring that State and local governments provide commercial air carriers use of airport facilities at rates and charges substantially below fair market value (or, in circumstances such as those at LAX where the historical costs of airport facilities supposedly have been recovered, at no charge at all), the decision below violates the Tenth Amendment.

Through the mandated subsidy, the DOT is effectively taxing those governments in the amount of the congressionally-authorized reasonable fees that they are expressly entitled to charge. Although congressional taxing powers may be delegated to the Executive Branch under some circumstances (*see Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-223 (1989)), Congress has never authorized the Secretary to require State and local governments to subsidize commercial air carriers. The airlines were unable to persuade Congress to require *federal* subsidization; no basis exists upon which DOT may require *State* and *local* government subsidization of airlines.

DOT's unlawful use of Congressional power violates fundamental principles of federalism – the counterpart to separation of powers that serves as a safeguard for political accountability and the protection of liberty. *Clinton v. City of New York*, 524 U.S. 417, 141 L. Ed. 2d 393, 421-23, 118 S. Ct. 2091, 2109-10 (1998). DOT is seeking to impose its requirement that State and local government airport proprietors subsidize commercial air carriers, without

any control by the citizens' congressional representatives. As this Court explained in *Clinton*, separation of powers not only operates on a horizontal axis to secure a proper balance of legislative, executive and judicial authority, but "operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised." *Id.* 141 L. Ed. 2d at 422-23, 118 S. Ct. at 2110.

The States of the Union are sovereign entities that must have a continuing "active participation in the fundamental processes of governance." *See Alden v. Maine*, 144 L. Ed. 2d 636, 653, 119 S. Ct. 2240, 2247 (1999). Consistent with those fundamental principles of federalism, this Court held in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), that Congress may not "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 176; *see also Printz v. United States*, 521 U.S. 898, 935, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program . . . [as] such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

Neither the Environmental Protection Agency in *New York v. United States*, nor the Department of Justice in *Printz v. United States*, could enforce federal legislation found to be unconstitutional because it constituted federal "commandeering" of the legislative process of the States. DOT cannot do so either.

The Secretary's decision has intruded impermissibly on the sovereign powers of State and local governments by requiring them to use their legislative and executive powers to subsidize airlines. DOT has attempted to justify this intrusion on remand by embracing arguments not even mentioned in the Secretary's decision below prior to the *LAX I* appeal, and by retroactively adding new conditions to federal grant statutes – conditions to which the State and local governments accepting federal grants plainly did not agree. DOT has also attempted to circumvent clear statutory expressions of Congressional intent, all in an effort to justify a historical cost requirement for which the *LAX I* panel concluded there was no basis in existing law. DOT is forbidden to commandeer State and local governments to achieve DOT's policy, especially where DOT is acting in defiance of the expressed will of Congress.

CONCLUSION

For all the foregoing reasons, Petitioner ACI-NA, on behalf of the State and local government proprietors of the Nation's principal airports, urges that this Court grant this petition to decide the issues of great national importance presented by this case.

Dated: September 14, 1999

Respectfully submitted,

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Nos. 99-466 & 99-500

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, *et al.*,
Petitioners,

and

AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that the Department of Transportation did not act arbitrarily or capriciously in finding that a component of the landing fee imposed on airlines by respondents City of Los Angeles, *et al.* for use of the Los Angeles International Airport was unreasonable under the Anti-Head Tax Act, 49 U.S.C. § 40116, because it did not correspond to any legitimate aeronautical cost.

PARTIES TO THE PROCEEDINGS AND RULE 26.1 STATEMENTS

In addition to the parties set forth in the petitions for certiorari, the following is a list of additional parties (together with their statements pursuant to S. Ct. R. 26.1) which were intervenors below in support of the United States Department of Transportation, *et al.* and which are respondents in this Court pursuant to S. Ct. R. 12.6:

Air Canada states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Air New Zealand Ltd. Airlines states that its parent company is Air New Zealand Limited Group and that there are no other publicly held corporations that own 10% or more of its stock.

Alaska Airlines, Inc. states that its parent company is Alaska Air Group, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

America West Airlines, Inc. states that its parent company is America West Holdings Corporation and that there are no other publicly held corporations that own 10% or more of its stock.

American Airlines, Inc. states that its parent company is AMR, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

American Trans Air, Inc. states that its parent company is Amtran, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

Continental Airlines, Inc. states that it has no parent companies and that Northwest Airlines Corporation owns 10% or more of its stock.

Delta Air Lines, Inc. states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Koninklijke Luchtvaart Maatschappij N.V. d/b/a KLM-Royal Dutch Airlines states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Compañía Mexicana de Aviación, S.A. de C.V. d/b/a Mexicana Airlines states that its parent company is Corporación Mexicana de Aviacion S.A. de C.V. and that there are no other publicly held corporations that own 10% or more of its stock

Southwest Airlines Co. states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

Trans World Airlines, Inc. (TWA) states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

United Airlines, Inc. states that its parent company is UAL Corporation and that there are no other publicly held corporations that own 10% or more of its stock.

United Parcel Service Co. states that its parent company is United Parcel Service, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

US Airways, Inc. states that its parent company is US Airways Group, Inc. and that there are no other publicly held corporations that own 10% or more of its stock.

Viacao Aerea Rio-Grandense d/b/a Varig Brazilian Airlines states that it has no parent companies and that there are no publicly held corporations that own 10% or more of its stock.

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IN THE

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*

Respondents Air Transport Association of America, *et al.*—the original complainants in the administrative proceedings below and intervenors in the Court of Appeals—hereby oppose the petitions for certiorari filed in this case by the City of Los Angeles, *et al.* (collectively, "the City") in

No. 99-466 and by the Airports Council International-North America ("ACI") in No. 99-500.[1]

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* S. Ct. R. 10. It implicates no conflict among the circuits and raises no important unsettled question of law. To the contrary, this case involves an ordinary exercise of agency discretion in determining the reasonableness of a rate subject to federal regulation. Like other similar regulatory statutes, the Anti-Head Tax of 1973 ("AHTA"), codified as amended at 49 U.S.C. § 40116, requires airports to assess only "reasonable" charges on aeronautical users. *See generally Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994) ("*Kent County*"). Pursuant to its expressly delegated authority to implement that statute, the Department of Transportation ("DOT") disallowed a portion of the fees charged by the City for the use of the Los Angeles International Airport ("LAX"). Applying the deferential standard of review this Court has squarely held is applicable to such agency policy determinations, *see id.* at 367, the Court of Appeals denied the City's petition for review, holding that DOT's determination was not arbitrary or capricious.

In a misguided attempt to transform this ordinary administrative rate proceeding into a case worthy of this Court's review, the City and ACI primarily present issues that were not raised below and that are not implicated by this case. For example, they argue that this case conflicts with circuit court decisions involving the standard of review for an agency's interpretation of federal grant agreements. Yet no party

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[1] This brief is filed on behalf of the Air Transport Association of America ("ATA") and the sixteen original complainant airlines listed above at pages ii-iii. A total of 59 airlines eventually participated in the administrative proceedings, and this brief will refer to all of them collectively as the "Airlines." All of the Airlines are now jointly represented in the administrative proceedings below.

raised that argument below—or even cited to those purportedly conflicting cases—because there is no dispute in this case as to the proper interpretation of the City's grants. The City's grants were involved here only to the extent that DOT considered certain unambiguous grant requirements as one factor supporting its determination as to the unreasonableness of the City's fees. Likewise, ACI's petition belatedly presents—for the first time in this case—an issue under the Tenth Amendment that has nothing to do with the rate regulation issues that are the real subject of this case.

Despite petitioners' attempt to manufacture new issues at this late stage of the proceedings, this case involves a straightforward application of the deference which this Court has clearly held is applicable to DOT airport rate determinations. And far from constituting a question of national importance, the underlying issue is unique because no other airport has ever attempted to impose the type of charges which DOT found unreasonable in this case. The petitions should therefore be denied.

COUNTERSTATEMENT

A. The City's New Fees

Federal law has long mandated that airport proprietors receiving federal grants must use all airport revenues only for airport operating and capital costs. *See* 49 U.S.C. § 47107(b). Nevertheless, beginning in the early 1990s, the City openly embarked on a campaign to balance its local budget by assessing new fees on the air traveling and shipping public—fees designed to earn significantly more than necessary to cover the costs of delivering service to those users—and then diverting those excess revenues to general City activities. This publicly-announced plan is fully documented in the record, which contains numerous public statements and actions by City officials evidencing the City's

intent. *See, e.g.*, J.A. 137, 151-153, 154, 155-156, 162-168, 227-229, 230.[2]

The centerpiece of the plan was the development of a new fee methodology expressly designed to create surpluses for eventual diversion. In furtherance of that strategy, the City commissioned a consultant to identify methods of achieving the City's goals. *See* J.A. 161, 187, 202, 212, 213. The consultant recommended that the City replace its residual fee methodology with a new "cost of service" (or "compensatory") methodology that would generate large surpluses. J.A. 216. A compensatory methodology is supposed to set aeronautical user fees at the amount necessary to cover the airport's actual costs of serving those users. *See City of Los Angeles Department of Airports v. DOT*, 103 F.3d 1027, 1029 (D.C. Cir. 1997). The consultant, however, specifically advised the City that it could maximize LAX "discretionary cash flow" (*i.e.*, generate a revenue surplus) if it included in the rate base items such as land rental charges that do not compensate for any out-of-pocket costs. J.A. 225.

The purpose of the new fees was clear. Indeed, the consultant explicitly acknowledged that "[t]he use of airport revenues and the establishment of landing fees are interrelated," J.A. 189, and recommended the adoption of a " 'dividend' policy to transfer 'airport revenues' to the [City's] general fund, notwithstanding the current limitations on such transfers." J.A. 191. The consultant explained that such "dividends" were "nothing more than a transfer to the general fund" that could be calculated in part by "a Land Rent Formula." J.A. 193-194. This proposal was a dramatic departure from traditional airport practices in the United States. As the consultant recognized, LAX "would be the first U.S. airport" to use fair market valuation to set landing fees. J.A. 222; *see also* J.A. 169-170 (hearing testimony).

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[2] "J.A." refers to the Joint Appendix filed below.

The record also demonstrates that the City had no need for these surpluses other than for the proposed diversion. As DOT found, the net income of the City's Department of Airports was $71 million in 1993-94, yielding an operating profit margin of nearly *40%*. J.A. 507. Its retained earnings also increased by more than $100 million in 1993-94, to $825,071,000. *Compare* J.A. 198, *with* J.A. 235; *see* J.A. 157-158. And unaudited financial statements for the first six months of 1994-95 showed an additional $65 million increase in retained earnings. J.A. 260A; J.A. 158-160.

B. The Administrative Proceedings

In 1994, responding to this Court's suggestions that airport rate determinations are best left to the discretion of an expert agency, *see Kent County*, 510 U.S. at 367, Congress enacted 49 U.S.C. § 47129 ("Section 47129"), which established an expedited procedure under which airlines may challenge the reasonableness of airport user fees before DOT. After enactment of the statute, the original complainant airlines (joined later by the other Airlines) filed administrative proceedings challenging the legitimacy of the City's 1993 fees and, thereafter, its 1995 fees.

The Airlines presented more than a hundred documentary exhibits and declarations supporting their complaint. After DOT found there was a "significant dispute" pursuant to Section 47129(c)(2), the matter proceeded to a hearing. Affirming a recommended decision of its Chief Administrative Law Judge, DOT determined (among other things) that the City's land rental charges were unreasonable and therefore invalid because they did not correspond to any valid airport cost.

C. The *LAX I* and *Policy Appeal* Decisions

The City petitioned the Court of Appeals for review of that decision, and in *City of Los Angeles Department of Airports v. DOT*, 103 F.3d 1027 (D.C. Cir. 1997) ("*LAX I*"), the court

remanded the case for further consideration. The court recognized that by adopting a compensatory methodology the City became obligated to set fees based upon "the actual costs to the City of maintaining and operating the airfield and the apron." *Id.* at 1029. But the Court held that DOT had incorrectly determined, as a matter of law, that the governing statutes allowed airports to recover only their out-of-pocket costs, and that DOT therefore had failed even to consider the City's contention that purported lost "opportunity costs" rendered its land rental charges reasonable. Accordingly, the court remanded the case with directions that the agency give "express consideration" to the City's argument that one of its "actual costs" is the "opportunity cost" it experiences by foregoing the value the City could obtain from the airfield land in the best alternative use. *Id.* at 1033-34.

Subsequently, the Court of Appeals ruled on the City's and ATA's petitions for review of DOT's revised Policy Regarding Airport Rates and Charges. *See Air Transport Ass'n of America v. DOT*, 119 F.3d 38 (D.C. Cir.), *amended by*, 129 F.3d 625 (D.C. Cir. 1997) ("*Policy Appeal*"). In ruling on the City's petition, the court held that DOT had not adequately explained its requirement that airports using compensatory methodologies must value land at historic cost. The court, however, concluded that DOT did not "make the same mistake that caused us to reject [its] prior determination that Los Angeles was obliged to use historic cost as the basis for airfield fees"—*i.e.*, that the statute itself required such valuation. *Id.* at 44. In particular, as the court noted, DOT fully addressed the City's opportunity cost argument, "observ[ing] that since airports are obliged to use their property as an airport, the concept of opportunity cost, and therefore fair market value, does not quite fit." *Id.* Even though the City challenged the rationality of this policy judgment, the court did *not* accept the City's arguments on that point. Instead, it faulted DOT for not adequately explaining why

administrative difficulties favored historic cost for airfield fees but not for non-airfield fees. *Id.* at 43-44.

D. The Remand Decision

On remand following *LAX I*, after carefully considering all of the parties' arguments regarding the reasonableness of the land rental charge, DOT issued its final decision. DOT determined that the City incurs no compensable opportunity costs by devoting its airfield land to that use because the City has no current opportunity to use the land for any other purpose, in light of its unambiguous voluntary grant assurances requiring it to use the land as an airport, as well as the practical impossibility of relocating LAX. Pet. App. 38a-44a, 46a-47a.[3]

DOT further determined that, even if the City had such opportunities, it incurs no net opportunity costs (and needs no additional monetary incentives) because it earns substantial monopoly-level profits from its unregulated non-aeronautical activities and because LAX bestows substantial benefits on the City. *Id.* at 39a n.7, 49a-52a. DOT also relied on the fact that LAX, among the many airports that have employed compensatory methodologies, is the *only* airport to have abandoned the universal practice of valuing airfield land at historic cost. *Id.* at 55a-58a. And in rejecting the City's contention that its land rental charge was needed for capital improvements, DOT found that the evidence did not support that contention but rather "suggests that the airport instead may have adopted that formula in order to raise funds that could be diverted off the airport if federal law were changed to allow that diversion of airport revenues." *Id.* at 62a.

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[3] "Pet. App." refers to the Appendix to the Petition in No. 99-466.

E. The Decision Below

The Court of Appeals denied the City's petition for review of the remand decision. The court noted that, unlike in the agency's original decision, in its remand decision DOT "rested its decision explicitly on policy grounds." Pet. App. 6a. The court thus recognized that

> [i]n reviewing the Department's order, we do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.

Id. at 10a (citing, *inter alia*, *Kent County*, 510 U.S. at 366-368).

Applying these well-settled principles of agency review, the court concluded that DOT's rejection of the City's "opportunity cost" argument was not arbitrary or capricious. Noting that the City's grant assurances unambiguously require it to maintain LAX as an airport, *see* 49 U.S.C. § 47107(a)(1), (a)(16)(c), and therefore eliminate any current opportunity to use its airfield land for something else, the court held that "we cannot say it was irrational for the Department to treat the grant assurances as a given and evaluate the City's proposed methodology from that perspective." Pet. App. 11a. The court also rejected the City's argument that upholding DOT's remand decision was inconsistent with the court's prior decision in *LAX I*. *Id.* at 12a-13a.

The court likewise rejected ACI's argument that by evaluating the City's opportunity cost argument with reference to the City's unambiguous grant assurances, DOT impermissibly added a new condition to those grants. As the court held, "we do not view the Department's reasoning as adding new conditions to the grant. Rather, the Department focused on a *consequence* of an unambiguously imposed condition—that

the airport would be kept open for public use—that was present from the outset." *Id.* at 13a (emphasis in original).

Finally, the court noted that DOT's decision could also be sustained on the alternative ground that it was reasonable for DOT to conclude that any purported opportunity costs incurred by the City in not using its land as an airport are covered by the enormous (and undisputed) benefits bestowed on the City by using the land for that purpose. *Id.* at 13a-15a. The court rejected the City's contention that by evaluating its opportunity cost argument with reference to these benefits, DOT contravened *Kent County*, *supra*, which holds that an airport employing a compensatory methodology need not cross-credit non-aeronautical revenues against aeronautical costs. *See also* 49 U.S.C. § 47129(a)(2) (permitting airports to use compensatory methodologies). As the court held:

> [T]he Department in no sense adopted a general requirement that airports must credit their non-airfield surpluses toward their airfield costs. The DOT is only taking into account non-airfield revenues, as well as all other economic benefits the City enjoys, in determining whether Los Angeles really has an uncovered opportunity cost. It is the City itself, by using the opportunity costs concept, that has invited the Department to think broadly about how such costs should be measured.

Pet. App. 14a.[4]

The court then denied the City's and ACI's petitions for rehearing and rejected their suggestions for rehearing *en banc*. Two non-panel judges dissented from this order, expressing the view that "another remand to [DOT] seems . . . in order" so that DOT might "resolv[e] other possible

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[4] The court also rejected the City's independent claim that DOT's decision effected an unconstitutional taking of its property. Pet. App. 15a-17a. Neither petition presents that issue for this Court's review.

theories supporting its rejection of opportunity costs." *Id.* at 116a, 115a. Judge Silberman, in an opinion concurring in the denial of rehearing, reiterated the panel's holding that DOT's decision was entitled to deference. But Judge Silberman also noted that, as a purely economic matter, the record evidence did not support the City's contention that "having taken taxpayer money under the condition that it would continue to use LAX as an airport [the City] is legally entitled to charge a significant group of those taxpayers, airline passengers flying in and out of LAX, its opportunity cost based on a nonexistent opportunity . . . ." *Id.* at 111a.

Yet while the dissenting judges (both of whom were on the panel that decided *LAX I*) apparently would have remanded the case yet again, they did not express the view that the decision below conflicted with *LAX I*. Likewise, no judge of the Court of Appeals, or any other court, has in any way intimated that the decision below conflicts with any other decision from any court.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Court of Appeals Correctly Applied This Court's Longstanding Precedents Governing Review of Administrative Rate Determinations

Six years ago, in its brief to this Court in *Kent County*, the City quite clearly stated its position that "[h]istorically, federal courts have declined to involve themselves in ratemaking" and that "accepted principles of deference to agency interpretation" required that this Court accept what the City understood to be DOT's interpretation of the Anti-Head Tax Act in that case. Brief for City of Los Angeles as Amicus Curiae in Support of Respondents at 12, 14, *Northwest Airlines, Inc. v. County of Kent*, No. 92-97.

This Court adopted that view in *Kent County*. As the Court held:

> Courts . . . are scarcely equipped to oversee, without the initial superintendence of a regulatory agency, rate structures and practices. The Secretary of Transportation is charged with administering the federal aviation laws, including the AHTA. His Department is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances. If we had the benefit of the Secretary's reasoned decision concerning the AHTA's permission for the charges in question, we would accord that decision substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

510 U.S. at 366-367 (additional citations and footnote omitted).

Likewise, although the decision in *Kent County* (which did not involve review of an agency decision) applied a reasonableness standard derived from Commerce Clause jurisprudence, the Court also made clear that

> [i]t remains open to the Secretary, utilizing his Department's capacity to comprehend the details of airport operations across the country, and the economics of the air transportation industry, to apply some other formula (including one that entails more rigorous scrutiny) for determining whether fees are "reasonable" within the meaning of the AHTA; his exposition will merit judicial approbation so long as it represents "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Id. at 368 n.14.[5]

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[5] Subsequently, Congress enacted Section 47129, which established the expedited rate-review procedures that were invoked in this case. Following this Court's guidance, Congress expressly provided that "[a]ny findings of fact in a final order of the Secre-

Thus, *Kent County* clearly sets forth the applicable standard for reviewing DOT decisions regarding the reasonableness of airport rates under the AHTA. As with other such agency decisions, the standard of review is highly deferential. Indeed, because an agency rate decision " 'is essentially a legislative function,' " *Kent County*, 510 U.S. at 366 (quoting *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)), it has long been recognized that an administrative agency charged with determining the reasonableness of rates "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

Yet after having itself successfully urged this Court to apply "accepted principles of deference" to DOT decisions regarding the reasonableness of airport rates, *see supra* at 10, the City now contends that "the court of appeals applied an improperly deferential standard of review." City Pet. at 17. In *Kent County*, the City urged a deferential standard of review because it believed that DOT's position was favorable to it in that case, and the Court endorsed that view. The City now takes the opposite view because DOT has not agreed with its position in this case. The application of *Chevron* deference, however, does not turn on which party prevails before the agency.

In an attempt to manufacture an issue for certiorari where none exists, the City and ACI contend that the decision below conflicts with the decisions of other courts addressing the standard of review for an agency interpretation of a federal grant provision. *See* City Pet. at 17-21; ACI Pet. at 15 (citing *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997)); *cf. Doe v. Board of Educ. of Oak Park & River*

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tary . . . if supported by substantial evidence, shall be conclusive if challenged in a court . . . ." 49 U.S.C. § 47129(c)(6).

Forest High Sch. Dist. 200, 115 F.3d 1273 (7th Cir.) (following *Riley* without independent analysis), *cert. denied*, 118 S. Ct. 564 (1997)). The Court of Appeals would undoubtedly be surprised to learn that its decision conflicted with these other circuit court decisions. For neither the City nor ACI ever raised this argument below (either before the panel or on rehearing), neither of them even *cited* to the allegedly conflicting cases, and the Court of Appeals did not address the issue on its own. Accordingly, even if this case involved a question regarding the proper standard for reviewing agency interpretation of grant agreements—which, as explained below, it does not—the issue has been waived.[6]

It is not surprising that the City and ACI did not raise this issue below, for there is no question in this case regarding the proper interpretation of the City's grant agreements. As in *Kent County*, this case involves the application of the general requirement of the AHTA that airports may assess only "reasonable" user fees. 49 U.S.C. § 40116(e)(2). This requirement is *independent* of any grant assurances.[7] The City contended that its land rental fees were reasonable in

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[6] *See, e.g., Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) ("The issue was not raised below, so we do not address it."); *Heller v. Doe*, 509 U.S. 312, 319 (1993) ("It would be imprudent and unfair to inject a new standard at this stage in the litigation. We therefore decide this case as it has been presented to the courts whose judgments are being reviewed.") (citations omitted); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990) ("We decline to consider that argument because it was not raised below."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the Court of Appeals and is not properly before us").

[7] The City's grant assurances also contain a similar provision requiring it to make its airport available "on fair and reasonable terms." 49 U.S.C. App. § 2210(a)(1) (1988) (since recodified as "reasonable conditions," 49 U.S.C. § 47107(a)(1)). Because the AHTA independently forbids the City from assessing unreasonable fees, the reasonableness requirement contained in this grant assurance has no independent effect in this case.

part because one of its aeronautical costs is the "opportunity cost" it purportedly is incurring by using its airfield land for an airport rather than something else. DOT rejected that argument, finding among other things (1) that the City presently has no legal or practical opportunity to use the land for another purpose, and (2) that the enormous benefits bestowed on the City by LAX more than compensate for any purported lost opportunity costs.

The only relevance of the City's grant agreements in this case involved the effect of *unambiguous* provisions under which the City promised that "the airport will be available for public use," and that it "will not make or allow any alteration in the airport or any of its facilities if the alteration does not comply with the plan the Secretary approves, and the Secretary is of the opinion that the alteration may affect adversely the safety, utility, or efficiency of the airport." 49 U.S.C. § 47107(a)(1), (16)(C). *See also id.* § 47107(a)(8) ("a proposal to close the airport temporarily for a nonaeronautical purpose must first be approved by the Secretary"). There has never been a dispute in this case that "[t]hese provisions forbid the City from converting the airfield land to rental property." Pet. App. 6a.[8]

DOT simply referred to the *effect* of these unambiguous provisions as one of many reasons for rejecting the City's opportunity cost defense to the unreasonableness of its fees. As the grant assurances unambiguously provide, the City has no legal right to use its airfield land for any other purpose. It therefore follows logically that the City is presently incurring

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[8] In a footnote to its petition, the City makes the conclusory assertion that these provisions do not unambiguously impose a continuing duty to keep LAX in operation. City Pet. at 22 n.18. The City did not raise this argument at any point below, doubtless because the argument flatly contradicts the statutory language. Indeed, the City's own intervenor, ACI, notes that "Los Angeles agreed to operate LAX as an airport for a period of years (and thus to forego alternative uses of the land) . . . ." ACI Pet. at 18.

no compensable opportunity costs because the land is being devoted to its only permissible use. Or, as the Court of Appeals put it, "the City is like an owner of a hot dog stand who claims his opportunity cost is the revenue he would earn selling cocaine rather than hot dogs." Pet. App. 9a.[9]

Thus, this case does not involve any question about the interpretation of the City's grants, much less the proper standard of review applicable to such interpretations. As the Court of Appeals properly held, DOT's reasonableness determination did not add new conditions to, or misinterpret, the City's grants, but rather simply "focused on a *consequence* of an unambiguously imposed condition—that the airport would be kept open for public use—that was present from the outset." Pet. App. 13a (emphasis in original). There is no reason why DOT could not take into account the effect of an *unambiguous* grant provision—or any other legal

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[9] It should be noted that while the City and ACI belatedly—and wrongly—complain about the standard of review employed by the Court of Appeals, neither asks this Court to review the court's holding that DOT's reasonableness determination passed muster under the deferential standard mandated by *Chevron* and *Kent County*. That issue has long since been settled. This Court held long ago in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), that an agency has the discretion to employ historic cost valuation in determining the reasonableness of rates. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) ("In *Hope* we ruled that historical cost was a valid basis on which to calculate utility compensation."). Under these precedents, DOT did not exceed its considerable discretion in rejecting the City's attempt to use purported "opportunity costs" to overturn the nearly universal agency preference for historic cost valuation that has prevailed since *Hope*. For even if the City may once have had an opportunity to use the LAX land for something else when the airport was constructed many decades ago, it clearly has none now. And the City's entirely *voluntary* decision to devote its land to airport use had nothing to do with the airlines which the City attempted to charge for these non-existent opportunity costs. It was therefore entirely reasonable for DOT to conclude that the City is not now incurring any ongoing, compensable opportunity costs by continuing to use LAX as an airport.

requirement—as one of many factors contributing to its informed policy judgment regarding the reasonableness of an airport rate. Indeed, even if DOT had ignored the effect of this grant assurance, it would have reached the same conclusion based on undisputed evidence that the City has no practical opportunity to relocate LAX. *See* Pet. App. 47a & n.13.

In sum, this Court has squarely held that DOT, like other agencies charged with determining the reasonableness of rates, has wide discretion in carrying out its delegated responsibility under the AHTA, and that the courts must accord its decisions substantial deference. Applying these well-settled standards, the Court of Appeals determined that DOT exercised its discretion in an appropriate manner. There is nothing about this typical rate case which remotely warrants this Court's intervention.

B. There is No Intracircuit Conflict

ACI (but not the City) urges the Court to resolve what it characterizes as an "intracircuit conflict" between the decision below and *LAX I*. *See* ACI Pet. at 13. There is no such conflict. The court in *LAX I* quite clearly held that "[h]istoric cost is, to be sure, one permissible measure of costs in cost-of-service ratemaking." Pet. App. 88a-89a. But because DOT had incorrectly determined, as a matter of law, that the governing statutes allowed airports to recover only their out-of-pocket costs, the panel remanded the case so that DOT could give "express consideration" to the City's opportunity cost argument. *Id.* at 93a. DOT followed those instructions faithfully, fully considering the issue for the first time on remand, and, in the decision below, the Court of Appeals upheld DOT's determination as a reasonable exercise of its policy judgment. *See also Policy Appeal*, 119 F.3d at 44.

In any event, as Justice Harlan once noted, "contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since

such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Hon. John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958).[10] The *en banc* process is the means of identifying and settling any intracircuit conflicts. Indeed, the absence of such a conflict in this case is demonstrated by the fact that no judge of the Court of Appeals—even the two who voted in favor of rehearing—identified such a conflict. Although those two judges believed the case should be remanded yet again for further consideration of the City's opportunity cost argument, neither of them in any way intimated that the decision below conflicted with *LAX I*. They did not do so because *LAX I* had simply remanded the case for consideration, as a matter of policy, of an argument that DOT had initially failed to consider.[11]

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[10] *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of petition presenting intracircuit conflict); Robert L. Stern, *et al.*, *Supreme Court Practice* 176 (7th ed. 1993) ("Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari.").

[11] ACI cites two cases in which the Court identified an intracircuit conflict in granting review, *see* ACI Pet. at 13 n.10, but both cases involved exceptional circumstances not presented here. In *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950), the Court reviewed a Second Circuit decision—rendered when *en banc* review was apparently unavailable in that court—adhering to the holding of an earlier decision with which the later panel unanimously disagreed. *See Lopinsky v. Hertz Drive-Ur-Self Sys., Inc.*, 194 F.2d 422, 429 (2d Cir. 1951) (Clark, J. concurring) (noting "the practice of this circuit never to sit in banc"). And in *Maggio v. Zeitz*, 333 U.S. 56 (1948), the Court reviewed another Second Circuit decision rendered during that same period, in light of that court's numerous conflicting decisions on the precise issue and its pre-eminent role in bankruptcy law at the time. *Id.* at 59-60. Here, by contrast, no judge of the Court of Appeals expressed disagreement with *LAX I*, and *en banc* review was available to resolve definitively any intra-circuit differences.

II. THIS CASE INVOLVES NO UNSETTLED ISSUE OF FEDERAL LAW

A. The Decision Below Does Not Conflict With This Court's Decision in *Kent County*

The City contends that the Court of Appeals' decision conflicts with this Court's holding in *Kent County* that the AHTA does not preclude an airport from establishing a "compensatory" methodology under which aeronautical users are charged for their share of airport costs without credit for surpluses that the airport may earn from unregulated non-aeronautical users such as concessionaires. *See* City Pet. at 25-29; *cf.* ACI Pet. at 19 (describing *Kent County* as addressing "similar" issue). This contention is baseless.

As the Court of Appeals correctly held, DOT "in no sense adopted a requirement that airports must credit their non-airfield surpluses toward their airfield costs." Pet. App. 14a. Quite to the contrary, DOT clearly held that the Airlines were required to pay for their share of *all* legitimate airport costs. *See* Pet. App. 51a ("we are not using the City's benefits to offset the City's other airfield costs"). As the Court of Appeals noted, DOT merely referred to non-aeronautical surpluses, as well as the enormous economic benefit LAX bestows on the City, as additional reasons for rejecting the City's contention that one of its "costs" is the purported opportunity cost it presently incurs by not using its airfield land for something other than an airport. *See* Pet. App. 14a ("The DOT is only taking into account non-airfield revenues, as well as all other economic benefits the City enjoys, in determining whether Los Angeles really has an uncovered opportunity cost."); *see also id.* at 51a-52.

The City has defended its fees with the contention that it is incurring enormous *costs*—which the Airlines must pay for—because it is not devoting its airfield land to some other use. Nothing in *Kent County* prevented DOT, in evaluating that argument, from considering evidence that the City is in

fact reaping enormous *benefits* from using its land in that manner. As the Court of Appeals put it,

> [i]t is the City itself, by using the opportunity costs concept, that has invited the Department to think broadly about how such costs should be measured. And we cannot hold that it was unreasonable for the DOT, when faced with a demand for economic analysis, to consider factors that an economist might take into account.

Pet. App. 14a-15a.

Contrary to ACI's preposterous suggestion, *see* ACI Pet. at 18, 20, such an analysis did not in this case—and could not ever—lead to airlines being charged nothing for their use of an airport. Airlines will continue to pay their share of all legitimate airport costs; DOT simply determined in this case that it was unreasonable for the City to charge the Airlines for non-existent "opportunity costs," thereby adding to its mounting surpluses available for unlawful diversion.

B. ACI's Tenth Amendment Argument Has Been Waived and is Frivolous

In its petition, ACI raises—for the first time in this five-year-long litigation—the contention that the decision below violates the Tenth Amendment and principles of "comity and federalism." *See* ACI Pet. at 21-23. The issue—which the City properly does not raise—was neither raised below nor considered by DOT or the Court of Appeals. The question is therefore not properly before the Court. *See* cases cited *supra* note 6.

But in any event, the issue is frivolous. The AHTA in no way " 'commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *New York v. United States*, 505 U.S. 144, 176 (1992) (citation omitted). Like other similar regulatory statutes enacted pursuant to Congress' Commerce Clause power, the AHTA prohibits airports from imposing

unreasonable fees on aeronautical users. The AHTA was prompted by Congress' concern that permitting airports (all of which happen to be owned by state and local governments) to assess unreasonable fees would result in "a proliferation of local taxes burdensome to interstate air transportation." *Kent County*, 510 U.S. at 363 (discussing legislative history). The AHTA alleviates this burden on interstate commerce by pre-empting unreasonable fees imposed by state and local governments in their capacities as airport operators. Nothing about the AHTA or its implementation by DOT even remotely raises a concern about "commandeering" state legislative processes to enact or enforce a federal regulatory program.

III. THIS CASE INVOLVES NO RECURRING ISSUE OF NATIONAL IMPORTANCE

The record in this case is clear that of the more than 500 public commercial service airports in the Nation, only *one*—LAX—has *ever* attempted to set landing fees based on the purported fair market value of airfield land. Every other airport employing a compensatory methodology has based its fees instead on the historic cost of that land—a methodology approved by this Court in *Hope Natural Gas* and almost universally employed by regulatory agencies. *See, e.g.*, 18 C.F.R. Part 201 at 507 (definition 9), 522 (instruction 7) (1999) (FERC requirement that land comprising gas plants be valued at historic cost); Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 350 (1993) (utility commissions generally value land at historic cost); *see also supra* note 9.

Indeed, the expert who devised the City's own fees stated at the time that "fair market" valuation had never been used before at U.S. airports to set landing fees, and LAX therefore "would be the first U.S. airport to do so." J.A. 222. *See also* J.A. 169-170 (hearing testimony). Thus, DOT expressly recognized the "undisputed fact that no other U.S. airport

calculates its landing fees on the basis of the fair market value of its airfield land, as shown by the record." Pet. App. 56a-57a. *See also* J.A. 506 (finding in initial decision that "historic cost has been the measure universally used by airports for valuing airfield land"). Even after the City imposed its new fees, no other airport followed suit.

This case therefore involves an isolated, unrepeated dispute between a single airport and the airlines serving it. That dispute was fostered by the City's attempt to generate enormous surpluses—over and above the actual capital and operating costs of LAX—available for possible diversion to pay general City expenses. Without the City's express policy of seeking to divert revenues whenever possible, there would have been little incentive for it to impose land rental charges whose only purpose is to generate such surpluses. *See* J.A. 189 (statement of City's expert that "[t]he use of airport revenues and the establishment of landing fees are interrelated"). No other airport operator has been as brazen in its desire to divert revenues, and none has sought to impose these charges. Moreover, DOT is presently considering, but has not yet promulgated, rules addressing this and related issues on a nationwide basis. *See* Pet. App. 8a; 63 Fed. Reg. 43,228 (1998). Thus, even if this case presented an important, unsettled issue of federal law—and it does not—there would be no cause for the Court to devote its scarce resources to resolving this unique dispute.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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Nos. 99-466 and 99-500

In the Supreme Court of the United States

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

AIRPORTS COUNCIL INTERNATIONAL–NORTH AMERICA, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Transportation permissibly determined under 49 U.S.C. 47129(a)(1) (1994 & Supp. III 1997) that it was unreasonable for the City of Los Angeles to calculate airport landing fees at Los Angeles International Airport based on the fair market rental value of the airfield land.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported 165 F.3d 972. The per curiam order of the court of appeals denying rehearing (Pet. App. 109a-117a) is reported at 179 F.3d 937. The decision of the

Department of Transportation (Pet. App. 18a-78a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1999. The petitions for rehearing were denied on June 18, 1999 (Pet. App. 118a). The petitions for a writ of certiorari were filed on September 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Anti-Head Tax Act permits state and local governments to collect "reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision." 49 U.S.C. 40116(e)(2). A second statute, 49 U.S.C. 47107, requires airports that accept federal grants to comply with certain conditions, including that "the airport will be available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. 47107(a)(1). The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569, requires the Secretary of Transportation to "issue a determination as to whether a fee imposed upon one or more air carriers * * * by the owner or operator of an airport is reasonable," if either an air carrier or the owner or operator of an airport requests such a determination. 49 U.S.C. 47129(a)(1) (1994 & Supp. III 1997). Under the FAAAA, the Secretary "may only determine whether the fee is reasonable or unreasonable and shall not set the level of the fee." 49 U.S.C. 47129(a)(3).

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[1] References to Pet. App. refer to the appendix included in the petition filed by the City of Los Angeles et al., No. 99-466.

The FAAAA also provides that "[a] fee subject to a determination of reasonableness * * * may be calculated pursuant to either a compensatory or residual fee methodology or any combination thereof." 49 U.S.C. 47129(a)(2). Under a residual methodology, the airport's profits from non-airfield sources—such as parking contracts and concession franchising—are used to reduce the airlines' landing fees. By contrast, a compensatory methodology calculates landing fees at a level sufficient to recover the entirety of the airport's aeronautical cost, without regard to revenues generated from non-aeronautical sources. Pet. App. 2a-3a, 14a n.3, 24a-25a.

2. Petitioners City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners (collectively the City) own and operate Los Angeles International Airport (LAX). Petitioner Airports Council International–North America (ACI-NA) is an airport trade association.

Before 1993, the City, pursuant to contracts with the airlines using LAX, calculated landing fees based on a residual methodology that applied any expected non-aeronautical surplus to the anticipated costs of aeronautical operations. Pet. App. 2a-3a. In 1993, the City proposed to calculate landing fees using a compensatory methodology that would charge the airlines for the entirety of its aeronautical costs. Also for the first time, the City included in its estimated aeronautical cost the current annual fair market rental value of the airfield land, on the theory that such valuation was necessary to compensate the City for the ongoing "opportunity cost" of using the airfield land for airport purposes. Appraising the airfield land at fair market value, together with other costs, led the City to propose

trebling the airlines' landing fees. When contract negotiations with the airlines for a compensatory fee agreement failed, the City unilaterally imposed the increased fees. *Id.* at 3a-4a.

The airlines filed a complaint with the Secretary under the FAAAA, challenging the new fees, including the fair market rental value charge. The Secretary concluded that the City's fair market value charge was unreasonable, because the Anti-Head Tax Act required that the City value the airfield land according to its historic cost. Pet. App. 4a-5a. The court of appeals reversed, holding that the Secretary erroneously concluded that the Anti-Head Tax Act mandated the use of historic cost valuation to the exclusion of every other method of valuing the land under the airfield. *Id.* at 5a (citing *City of Los Angeles* v. *DOT* (*LAX I*), 103 F.3d 1027, 1032 (D.C. Cir 1997)). The court of appeals in *LAX I* accordingly directed the Secretary on remand to consider the "respective merits of the historic cost and fair market value methodologies here at issue." 103 F.3d at 1032; see also Pet. App. at 87a-94a.

3. On remand, the Secretary concluded that the City unreasonably calculated landing fees at LAX based on the fair market rental value of the airfield land. Pet. App. 18a-78a. The Secretary rejected the City's principal contention that the fair market value calculation was needed to defray the City's opportunity costs of using the airfield land for airport purposes. The Secretary reasoned that the City "incurs no opportunity cost when the airfield land is used for the airfield," because the City is legally obligated to continue using LAX as an airport. *Id.* at 38a. The Secretary explained that the City accepted federal grants for the eleven years preceding 1993 under agreements in which the City assured the FAA that it would continue operating LAX

as an airport for the foreseeable future. *Id.* at 40a-41a. The Secretary also reasoned that the City was bound by federal law to make LAX available for public use as an airport and not to alter LAX's layout plan without the Secretary's prior approval. *Id.* at 40a (citing 49 U.S.C. 47107(a)(1) and (16)).

The Secretary also rejected the City's contention that a fair market value charge was necessary "to give the City 'the proper incentive' to continue operating the airport." Pet. App. 45a. The Secretary concluded that "the City has not shown that it needs any such incentive," because "[t]he airport provides major benefits for the Los Angeles area's economy, generates large earnings, and cannot practicably be replaced or moved." *Ibid.* The Secretary explained that

> [t]he City's calculation of its alleged opportunity costs gave no recognition to the benefits it receives from the airport. The City's position essentially assumes that the City's use of the land as an airport creates no benefits at all for the City, a statement which * * * is contrary to the record and common sense.

Pet. App. 50a.

The Secretary also relied on the fact that "no other U.S. airport calculates its landing fees on the basis of the fair market value of its airfield land." Pet. App. 56a-57a. The Secretary reasoned that the universal practice by airports of valuing airfield land at historic cost in setting compensatory fees "suggests that the [fair market value] charge is neither essential for airport operations nor generally viewed by other airports as desirable." *Id.* at 57a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court of appeals held that the Secretary reasonably

rejected the City's fair market value charge on the ground that the City had a fixed legal obligation to use LAX as an airport. *Id.* at 10a-12a. The court of appeals also upheld as reasonable the Secretary's alternative conclusion that the benefits that LAX confers on the City offset any opportunity costs resulting from operating LAX as an airport. Pet. App. 13a-15a.[2]

The court of appeals denied rehearing en banc. Pet. App. 109a-110a. Judge Silberman filed a statement concurring in the denial of rehearing en banc. *Id.* at 110a-113a. Judge Williams and Judge Ginsburg dissented. *Id.* at 113a-117a. In their view, the agency had not set forth an adequate basis for rejecting the City's contention that it reasonably set landing fees based on its opportunity costs. *Ibid.*

ARGUMENT

1. Petitioner ACI-NA contends (Pet. 13-14) that this Court should grant certiorari to resolve an alleged inconsistency between the court of appeals' decision and its prior decision in *LAX I*. The decision below, however, does not conflict with *LAX I*. In *LAX I*, the court of appeals held that the Secretary had misconstrued the Anti-Head Tax Act and 49 U.S.C. 47129 (1994 & Supp. III 1997) to mandate that landing fees be assessed based on the historic cost of the airfield. Pet. App. 88a-90a. The court of appeals thus directed the Secretary on remand to "give express consideration to the City's arguments in support of market valuation, which he did not address before presumably because he thought he was bound by the statute to use the historic

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[2] The court of appeals also rejected the City's contention that the Secretary's decision constituted an unconstitutional taking. Pet. App. 15a-17a. Petitioners do not ask this Court to review that ruling.

cost approach." *Id.* at 93a. Nothing in that decision barred the Secretary on remand from considering the City's claim of opportunity costs, and then determining that the City's opportunity costs were nonexistent because the City was bound by its grant obligations to operate LAX as an airport. Because the court of appeals in *LAX I* "did not analyze any argument based upon the federal airport grant provision," *Id.* at 12a-13a, *LAX I* is entirely consistent with the court of appeals' conclusion that the Secretary reasonably considered and rejected the City's opportunity cost theory.[3]

2. Petitioners contend (City Pet. 18-24; ACI-NA Pet. 14-17) that the court of appeals erred in deferring to the Secretary's determination because the federal airport grants to the City did not unambiguously state that the City could not use fair market valuation in setting landing fees at LAX. Petitioners argue that the decision below was therefore at odds with *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), in which this Court stated that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."

Nothing in the decision in *Pennhurst* suggests, however, that when it is clear that Congress intends to impose obligations on local governments receiving federal funds, the scope of those obligations should be determined by anything other than normal rules of statutory construction, including principles of deference

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[3] In any event, any inconsistency between the two decisions of the D.C. Circuit would not warrant resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, Congress has expressly provided that the Secretary "shall issue a determination as to whether a fee imposed upon one or more air carriers * * * by the owner or operator of an airport is reasonable." 49 U.S.C. 47129(a)(1) (1994 & Supp III 1997). The Secretary's reasonable determination under that delegated power is therefore entitled to deference.

Indeed, even before Congress passed the FAAAA to direct the Secretary to resolve airport fees disputes, this Court recognized that the Secretary is "equipped, as courts are not, to survey the field nationwide, and to regulate" airport fees imposed under the Anti-Head Tax Act. *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 367 (1994). The Court likewise concluded that the Secretary's reasoned decision on the appropriateness of a fee methodology would be entitled to "substantial deference." *Ibid.* (citing *Chevron U.S.A.* 467 U.S. at 842-845); see also *Kent*, 510 U.S. at 368 n.14 (noting that the Secretary could use his "capacity to comprehend the details of airport operations across the country and the economics of the air transportation industry" in order to determine whether fees are reasonable under Anti-Head Tax Act, and that Secretary's "exposition will merit judicial approbation" if it is based on permissible reading of the statute). The court of appeals thus properly deferred to the Secretary's reasoned determination under the FAAAA.[4] Cf. *City*

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[4] For those reasons, petitioners err in contending (City Pet. 17-21; ACI-NA Pet. 15) that the court of appeals' decision conflicts with *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), and *Doe* v. *Oak Park & River Forest High School District*, 115 F.3d 1273 (7th Cir.), cert. denied, 118 S. Ct. 564 (1997). Those decisions, which petitioners did not cite before the

of New York v. *FCC*, 486 U.S. 57, 64 (1988) (statutorily authorized regulations of federal agency pre-empt conflicting state or local law).

Moreover, the Secretary's conclusion that the City has no recoverable opportunity costs in operating the airfield land for airport purposes did not add any new condition to the federal grant. Federal law and the grant agreements with the City clearly require the City to use LAX for airport purposes and to impose only reasonable fees. Pet. App. 12a, 39a-42a.[5] Because those obligations bar the City from converting the airport to other uses, the Secretary determined that the City unreasonably employed a fair market value methodology to compensate it for the opportunity cost of putting the airport to other uses. As the court of appeals explained, the Secretary's ruling simply "focused on a *consequence* of an unambiguously imposed condition—that the airport would be kept open for public use—that was present from the outset." *Id.* at 13a. The Secretary therefore properly relied on the City's grant assurances in determining that the City's proposed opportunity cost pricing was unreasonable.[6]

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court of appeals, address the obligations of state and local governments under the Individuals with Disabilities Education Act, 20 U.S.C. 1412(1), to "assure[] all children with disabilities the right to a free appropriate public education."

[5] The City implies (Pet. 22 n.18) that the grant conditions do not expressly require it to operate LAX as an airport. The City did not challenge, however, the Secretary's conclusion that the City must use the airfield for airport purposes, Pet. App. 39a-42a, and petitioners do not suggest that the City presently may convert the airport to any other use.

[6] Indeed, it is difficult to imagine how, under the petitioners' theory, the Secretary could fulfill his statutory mandate under 49 U.S.C. 47129 (1994 & Supp. III 1997) to determine whether airport

3. Petitioners also argue (City Pet. 25-29; ACI-NA Pet. 16-20) that the Secretary's alternative rationale—that any opportunity costs incurred by the City are offset by the benefits the City receives from LAX—conflicts with 49 U.S.C. 47129(a)(2), which permits airlines to adopt a compensatory fee methodology, and is inconsistent with the Court's acceptance of a compensatory methodology in *Kent*. Neither of those contentions has merit.

As an initial matter, the Secretary's decision does not bar the City from charging compensatory fees that reimburse the City for the entirety of its aeronautical operations cost, without regard to any surplus or deficit in revenues from non-aeronautical operations. Rather, the Secretary concluded that it was unreasonable for the City to calculate its aeronautical costs by using the fair market value of the airfield land when the City incurs no opportunity costs from using the airfield land for airport purposes. As the Secretary stated, his "analysis in no way precludes the airport from charging landing fees covering its other costs. Indeed, [the Secretary] ha[s] upheld over the airline complainants' objections most of the other charges included in calculating the LAX landing fees." Pet. App. 52a.

The Secretary's reasoning is also fully consistent with this Court's decision in *Kent*. In that case, the Court held that the reasonable fee requirement of the Anti-Head Tax Act does not compel an airport to use its earnings from non-aeronautical sources to lower its aeronautical fees, and that an airport may reasonably

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fees are reasonable. The statutory scheme would become a virtual nullity if the basis for a determination by the Secretary that a fee is unreasonable could be challenged as an impermissible "new condition" on the local government.

charge airlines for the full cost of providing the particular facilities and services they use. 510 U.S. at 369-372. The Court did not address whether an airport operator may calculate its aeronautical costs by the fair market rental value of airfield land based on opportunity costs. Indeed, LAX is the only airport in the country that has attempted to base its landing fees on its airfield's fair market value. Pet. App. 56a-57a.

Moreover, the Secretary's decision "in no sense adopted a general requirement that airports must credit their non-airfield surpluses toward their airfield costs." Pet. App. 14a; see also *id.* at 51a ("we are not using the City's benefits to offset the City's other airfield costs"). Rather, the City's contentions that it incurred opportunity costs invited the Secretary to consider whether the benefits to the City from the airport were insufficient to give the City an incentive to continue to operate LAX. *Id.* at 14a; see also *id.* at 50a-51a ("The City's expert * * * stated that a person's use of a property incurs no opportunity costs if that use generates more revenue than the person could obtain from any other use of the property."). The court of appeals therefore correctly concluded that it was reasonable for the Secretary, "when faced with a demand for an economic analysis, to consider factors that an economist might take into account." *Id.* at 14a-15a; see also *Kent*, 510 U.S. at 367, 368 n.14.

4. Petitioner ACI-NA also asserts (Pet. 21-23) that the Secretary's determination requires the City to subsidize airlines in violation of the Tenth Amendment principles articulated in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). That argument was not made below and, accordingly, is not properly before this Court. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per cu-

riam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); accord *Auer* v. *Robbins*, 519 U.S. 452, 463-464 (1997); *Citizens Bank of Md.* v. *Strumpf*, 516 U.S. 16, 20 n.* (1995); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

In any event, petitioner's contention erroneously assumes that the City must subsidize airlines because the City cannot recover the opportunity costs of continuing to operate LAX as an airport. As discussed above, however, the City is prohibited from converting LAX to non-airport uses and therefore incurs no such opportunity costs. The Secretary therefore properly determined that it was unreasonable for the City to take the unprecedented step of charging airlines the fair market rental value of airfield land based on a "non-existent opportunity" to use the land for non-airport purposes. Pet. App. 111a (Silberman, J., concurring in the denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

AIRPORTS COUNCIL
INTERNATIONAL–NORTH AMERICA,

Petitioner,

vs.

UNITED STATES DEPARTMENT
OF TRANSPORTATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

In their briefs in opposition, the Department of Transportation and Air Transport Association do not engage the substantive issues presented. They do not explain why *Chevron* should trump *Pennhurst's* "clear statement" requirement. While they do not dispute that DOT's decision requires LAX to give the airlines free use of its most valuable asset, they offer no rationale for why the airlines should be entitled to such a subsidy. They also studiously avoid explaining why LAX's fair market value-based charge is actually unreasonable – although it was the airlines' burden to establish that the fee was unreasonable.

This case presents an unmistakable conflict between the circuits on an important federal question regarding the interpretation of federal grant conditions, in addition to an intracircuit conflict in the circuit most likely to review DOT decisions regarding airport rates. The Court has not reviewed an airport rates case since the enactment of the Federal Aviation Authorization Administration Act of 1994, 49 U.S.C. § 47129, following the Court's decision in *County of Kent*. Congress has expressly required that airports be as self-sustaining as possible and has chosen not to allow the Secretary to set the level of airport fees. Here, the Secretary has set the level of the airfield land rental charge at zero, ensuring that LAX will not be as self-sustaining as possible.

I. The Case Presents Issues of Profound National Importance

ATA asserts that this case merely involves "an isolated, unrepeated dispute between a single airport and the airlines serving it." ATA Brief at 21. Nothing could be further from the truth. ACI-NA has been an intervenor in this case at every stage below because of its profound importance to the nation's airports, the state and local governmental proprietors that have the responsibility of operating them, and the national air transportation system. ACI-NA is deeply concerned about the effect this case may have on the ability of airports to meet the needs of the 21st century. The nation's airports are already at their breaking point due to capacity limitations and congestion problems. The decision below threatens airports' ability to fund necessary expansion and casts into question their understanding of the terms upon which they have accepted federal development funds.

Squarely at issue in this case is the question of whether DOT may retroactively add new, unstated conditions to federal grant assurances. Almost all of the nation's principal airports have agreed to specified conditions in return for federal grants. Airports cannot be "fully cognizant of the consequences of their participation" if the Department can add conditions not found in the plain language of the grant assurances.

Without complaint from airlines, airports that have accepted federal grants have long charged airlines fair market value-based rental charges for the use of land underlying terminal, cargo and maintenance facilities. The airlines have already argued that the rationale of the

decision below – that the grant assurance to keep the airports open to the public has the "consequence" of removing airports' opportunity cost – should be applied to such other assets to prohibit fair market value charges. The consequence of such a determination, an outflow of airport funds into the pockets of the airlines, would be highly detrimental to airport development.[1]

Another critical issue in this case is whether DOT can openly thwart the will of Congress. Here DOT has determined that a major airport must provide for the airlines' use its most valuable asset (the prime real estate underlying the airfield at LAX) without charge for as long as it operates as an airport. Congress has expressly stated that airports are entitled to collect reasonable rental charges from air carriers for their use of airport facilities and has required that airports charge fees that will make them "as self-sustaining as possible." The decision below ignores these express requirements.

Of equal importance is the question of whether DOT can force state and local governmental proprietors to give profit-making commercial airlines subsidies in the form of below-fair market value charges for their use of locally-funded airport assets. Yet another issue is whether

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[1] As the *LAX I* court noted, nothing in existing law mandated the use of historical costs or any other "single formula" in airport ratemaking. App. 89a (quoting *Federal Power Com. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S. Ct. 736, 86 L. Ed. 1037 (1942)). Different methodologies produce reasonable rates and airports must have the flexibility to choose the appropriate methodology based on individual circumstances.

the authority that Congress gave the Secretary to determine the reasonableness (but not set the level) of airport fees permits the Secretary to impose a form of regulation that is more draconian than utility regulation (in which the regulators are expressly allowed to set the level of the fee).[2]

Despite the airlines' rhetoric about potential unlawful diversion of LAX airport revenues – a red herring upon which neither DOT nor the D.C. Circuit based any of their decisions in this case – the issues presented are neither insignificant nor isolated. Only the Court can resolve the critical issues presented.

II. Respondents Have Utterly Failed to Address the Merits of ACI-NA's Petition

DOT and ATA do not address the fact that, in violation of *Pennhurst*, DOT has construed a grant assurance to impose an unstated condition: Grant recipients who agreed to keep an airport open to the public are limited to recovery of their historical costs. DOT and ATA do not explain how airports that accepted the grant condition could possibly have known that such a condition existed. DOT *itself* was not cognizant of such a consequence; if it were, it would have surely addressed it in its Final Decision, in which DOT laid out several other rationales for requiring the use of historical cost (each of which was

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[2] In utility regulation, where the use of historical costs is required, it is always coupled with an allowed rate of return. Here the Secretary is mandating the use of historical costs without providing *any* allowed rate of return on the assets subject to regulation.

rejected by the *LAX I* panel). Only on remand did DOT discover this "consequence," which it now argues flows from the grant language.

After having urged the Secretary on remand to adopt its ill-conceived grant condition rationale, ATA attempts an end-run around the *Pennhurst* prohibition by claiming that the Secretary's decision on reasonableness was "independent" of the grant assurances. *See* ATA Brief at 13. The Secretary's decision unquestionably rests on the airlines' novel construction of the grant assurance.[3]

DOT and ATA do not explain the non sequitur in the conclusion that once LAX decided to forego alternative uses of the land (thus incurring opportunity costs), it no longer had the opportunity to use the land for any other purpose and therefore had no opportunity costs. They also do not explain how the "benefits" LAX provides to Los Angeles have anything to do with the reasonableness of the fee, except to repeat the *LAX II* panel's statement that Los Angeles invited the Secretary to "think broadly" about opportunity costs and to "consider factors that an economist might take into account." App. 14a-15a. No economist would consider the benefits the airport provides to the City in determining what a reasonable fee should be for airlines' use of airport facilities. Indeed, the

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[3] Both ATA and DOT imply that the decision below was based on other rationales such as other airports' use of historical cost and purported difficulties in determining fair market value, but as the dissent noted, the Secretary's decision "does not suggest that these issues were decisive, and they played no role in the [*LAX II*] panel's affirmance." App. at 116a.

LAX II panel conceded that economists would disapprove of DOT's approach. *See* App. 10a.

Neither DOT nor ATA attempt to respond to the fact that the decision below gives the airlines free use of LAX's airfield land notwithstanding Congress's express authorization that airports charge air carriers reasonable rental charges for the use of airport facilities. It is not surprising that ATA would not want to highlight this fact. DOT provided no explanation for giving the airlines free use of the airfield or why the decision is consistent with the "self sustaining" requirement.

DOT and ATA's failure to explain why the fair market value charge is actually unreasonable is also not surprising because the airlines chose not to challenge the appraisal upon which the fair market value charge was based. App. at 91a-92a. They simply dispute the fact that Los Angeles incurs an opportunity cost in connection with its devotion of the LAX land to the airlines' use, even though the opportunity cost rationale was but one of many justifications for the fair market value charge.

III. Respondents' Arguments Against Review Are Entirely Without Merit

ATA (but not the Solicitor General) erroneously argues that the *Pennhurst* issue was not raised below. *Pennhurst's* prohibition on imposing unstated conditions on recipients of federal funds has been at the center of the case since DOT, on remand, adopted the grant condition argument the airlines had unsuccessfully made to the *LAX I* court. If the *Pennhurst* issue had not been raised below, it would not have been addressed as it was – albeit

superficially – in *LAX II*. *See* App. at 13a. The issue is plainly before the Court, and Respondents cannot escape the fact that there is a conflict between the decision below and the decisions of the Fourth and Seventh Circuits regarding the application of *Pennhurst's* "clear statement" requirement.

ATA and DOT also contend that there is no conflict between the *LAX I* and *LAX II* decisions. ATA asserts that the dissenting judges did not express the view that the *LAX II* decision conflicted with *LAX I*. To the contrary, the conflict is evident from the outset of the dissenting opinion. In it, Judges Williams and Ginsburg state that the *LAX II* panel (contrary to the dissenters' earlier *LAX I* decision) "upholds as reasonable DOT's insistence that the charge for the airport's land be calculated on the basis of historical accounting cost." App. 113a. The dissenters' vigorous disagreement with the *LAX II* decision amply demonstrates the intracircuit conflict.

Respondents also assert that ACI-NA's argument addressing DOT's requirement that state and local governments subsidize profit-making private air carriers was not raised below. Again, they are wrong. This argument was made at each stage below. *See, e.g.*, ACI-NA's Petition for Rehearing and Suggestion for Rehearing En Banc, No. 98-1071 (D.C. Cir., Mar. 22, 1999), at 2, 10 (decision below provides a subsidy to profit-making airlines at the expense of state and local governments; "[n]othing in the applicable legislation suggests, however, that Congress intended to require the States to subsidize air carriers."); Opening Brief of Intervenor ACI-NA in Support of Petitioner, No. 98-1071 (D.C. Cir., Aug. 8, 1998), at 3 ("DOT is

effectively requiring local government proprietors to subsidize profit-making commercial air carriers"); Respondents' Opening Brief on Remand, Docket Nos. OST-97-2329 and OST-95-474 (DOT, May 9, 1997), at 14 ("There is no basis whatsoever to require that profit-making airlines be subsidized by state or local government proprietors.").[4]

Finally, ATA presents a strawman argument, asserting that the ACI-NA's argument is "frivolous" because the AHTA in no way commandeers the legislative processes of the States. However, ACI-NA does not challenge the AHTA here; ACI-NA's argument is directed towards *DOT's* commandeering of state and local governments in defiance of the expressed will of Congress. *See* ACI-NA's Petition at 21-23.

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[4] The fact that ACI-NA did not denominate its argument a "Tenth Amendment" claim is of no consequence; the parties and the lower court were aware of the substance of the claim and review is not precluded simply because it was not so labeled. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 419-20, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991) (petitioner preserved claim for review where motions below mentioned neither Equal Protection Clause nor Fourteenth Amendment but petitioner alleged that prosecution engaged in pattern of excluding black persons from juries). A petitioner may make any argument in support of a claim made below, as "parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534-35, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (petitioner can "frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.").

CONCLUSION

For the foregoing reasons and those set forth in ACI-NA's Petition for a Writ of Certiorari, Petitioner ACI-NA, on behalf of the state and local government proprietors of the nation's principal airports, urges that this Court grant this petition to decide the issues of great national importance presented by this case.

Dated: December 3, 1999

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